INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	9
Conclusion	17

CITATIONS

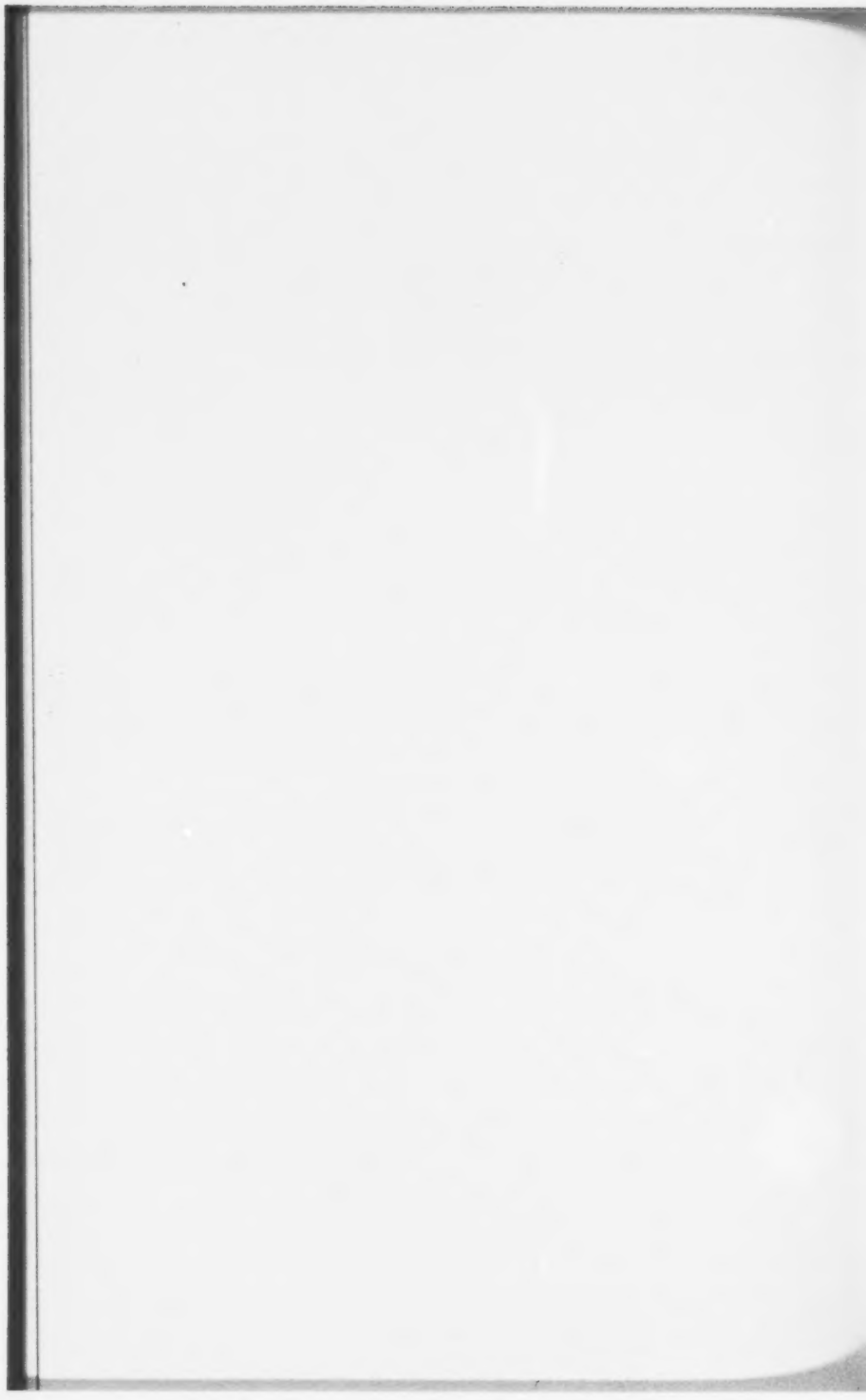
Cases:

Abrams v. *United States*, 250 U. S. 616	11
Brooks v. *United States*, 267 U. S. 432	11
Cannon v. *United States*, 116 U. S. 55	11
Claassen v. *United States*, 142 U. S. 140	12
Evans v. *United States*, 153 U. S. 584	11
Hagner v. *United States*, 285 U. S. 427	11
Hewitt v. *United States*, 110 F. (2d) 1, certiorari denied, 310 U. S. 641	10
Pierce v. *United States*, 252 U. S. 239	11
Reg. v. *Tolson*, 23 Q. B. D. 168, 60 L. T. R. 899 (1889)	14
Shaw v. *United States*, 292 Fed. 339	10
Stumbo v. *United States*, 90 F. (2d) 828	11
United States v. *Balint*, 258 U. S. 250	14

Statutes:

Internal Revenue Code, Sec. 2857 (53 Stat. 1, 327; U. S. C. Supp. V, Title 26, Sec. 2857)	2
U. S. C., Title 18, Sec. 390	8

292474—41——1



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 704

MONARCH DISTRIBUTING COMPANY, A CORPORATION, AND JOSEPH S. MEYER, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 495–501) is reported in 116 F. (2d) 11.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 5, 1940 (R. 501), and a petition for rehearing (R. 503–516) denied December 18, 1940 (R. 517). The petition for writ of certiorari was filed January 16, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The petition for a writ of certiorari and supplements thereto recite eleven questions presented, which seem to reduce themselves to two:

1. Whether Counts 1 and 6 of Indictment 15126 and Counts 1 to 3, inclusive, of Indictment 15129 are so deficient in substance as to be open to attack for the first time in this Court.

2. Whether there was a complete failure of proof to support petitioners' convictions upon Count 1 or Count 6 of Indictment 15126.

STATUTE INVOLVED

Section 2857 of the Internal Revenue Code (53 Stat. 1, 327; U. S. C. Supp. V, Title 26, Sec. 2857) provides in part:

> (a) Requirements.—Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: * * * The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner [of Internal Revenue], with the approval of the Secretary [of the Treasury], may prescribe.
>
> * * * * *

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, *or makes any false entry therein*,[1] or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

* * * * *

STATEMENT

Two indictments were returned in the United States District Court for the Eastern District of Illinois (Indictments 15126 and 15129). Indictment 15126 (R. 2–26) involves both petitioners, while Indictment 15129 (R. 29–42) involves petitioner Monarch Distributing Company alone.

Indictment 15126 contains 12 counts, and Indictment 15129 seven counts. A jury being

[1] The counts herein discussed are all predicated upon this provision of the statute.

waived (R. 421), the District Judge tried the cases and found both petitioners guilty under 11 of the 12 counts of Indictment 15126 (R. 423). Petitioner Monarch Distributing Company was found guilty under all counts of Indictment 15129 (R. 424). Petitioner Meyer was fined $1,000 and sentenced to imprisonment for two years (R. 427–428). Petitioner Monarch Distributing Company was fined $2,500 upon each indictment. These punishments were not allocated to any one count. (R. 425–426, 429–430.)

The Circuit Court of Appeals in affirming the convictions considered only Counts 1 and 6 of Indictment 15126 and Counts 1 to 3, inclusive, of Indictment 15129, the punishment imposed under each indictment not being in excess of that which could be imposed under any one of the counts considered. Petitioner Monarch Distributing Company concedes the sufficiency of the evidence to sustain its conviction under Counts 1 to 3, inclusive, of Indictment 15129 (Pet. 14), but asserts that those counts are fatally deficient (Supplements to petition). Both petitioners challenge the sufficiency of the evidence as to Counts 1 and 6 of Indictment 15126, as well as the adequacy of those counts.

Count 1 of Indictment 15,126 charged that the petitioner Monarch Distributing Company, and petitioner Meyer, and another, who had control of the books and records of the corporation, made

a false entry in a certain record required to be kept, known as Treasury Department Form 52A, which record constituted a portion of the monthly report of a wholesale liquor dealer. This entry represented that certain alcoholic spirits were received by the defendants from the F. J. Skye Distributing Company on July 22, 1939 (R. 132–133), and the count alleged that the entry was false in that the spirits were in fact received on July 20, and was further false in that the entry was not made on July 22, the date it purported to have been made, but on July 24, the defendants well knowing the entry to be false (R. 2–4).

The principal Government evidence relating to Count 1 is as follows: The parties stipulated in the District Court that the Skye Distributing Company sold and delivered 41 cases of liquor to the Monarch Company on July 20, 1939 (R. 342; Govt. Ex. 17, R. 283), and Revenue Inspector Brendel testified that he observed a Skye Distributing Company truck unloading liquor at the Monarch Company on the evening of July 20, and that petitioner Meyer was present (R. 349). The parties stipulated that a check was given in payment to the Skye truck driver, Hameton [Hamilton] (R. 342). Hamilton recalled an evening delivery to Monarch about that time but could not recall the date, and testified that Meyer gave him the check (R. 369).

Inspector Brendel checked the Monarch records on July 21, on July 22, and at 10:00 A. M., July 24, and found no entry of the receipt of this shipment.

Subsequent to that time the shipment was recorded as having been received on July 22 (R. 132–133). Brendel testified that when Meyer was asked on July 21 whether any receipts or disposals remained unrecorded, he replied there were none (R. 372). Meyer testified that the shipment was received from Skye Company on July 21, entry thereof being made on July 24, under date of July 22 (R. 389).

On July 21 the Monarch Company made a substantial sale of liquor to one Melvin Thompson which, as shown by a comparison of the Skye and Thompson invoices, included numerous cases of liquors that were received from the Skye Company on July 20 (R. 373; Govt. Ex. 17, R. 283; Govt. Ex. 58, R. 412–414).

Count 6 of Indictment 15126 charged that on October 13, 1939, the Monarch Co., Meyer, then its vice president, and another, made a false entry on a record required to be kept, known as Treasury Department Form 52 B, which record constituted a portion of the monthly report of a wholesale liquor dealer. The entry represented that certain alcoholic spirits had been sent to Joe Nelson, whose address was Leonard, Texas (R. 224–225), and the count alleged that the entry was false in that the shipment was not sent to Joe Nelson at Leonard, Texas, but was in fact sent to one Joe Nelson located at Kansas City, Missouri, the defendants well knowing the entry to be false (R. 11–12).

The principal Government evidence with reference to Count 6 is as follows: On October 13, 1939,

the Monarch Company sold, and recorded on its Treasury Department Form 52B, a sale of liquor to Joe Nelson listing his address as Leonard, Texas (R. 224–225, 281, 325).[2] The liquor was, however, actually consigned C. O. D. via Riss & Co., a motor vehicle common carrier, to Joe Nelson, Kansas City, Missouri (R. 318–319). Riss & Co. employees identified one Chester Tork as the man who paid for and received the goods in Kansas City, identifying himself as Joe Nelson (R. 344, 345, 347). Inspector Brendel saw Chester Tork in Meyer's office on July 18, 1939, where Meyer and Tork were closeted for about an hour (R. 343). There had been numerous prior sales by Monarch to Joe Nelson, Leonard, Texas (R. 265–282), and entries of such sales on Treasury Form 52 B (R. 146, 150, 172, 178, 184, 192, 206, 210, 222), which had come to Brendel's attention (R. 343, 349, 370).

Revenue Inspector Grinn testified that he made three trips to Leonard, Texas, which has a population of about 1,300, that he interviewed the postmaster (who called in the rural carriers), the hotel man, 6 of the 12 retail merchants, the City Marshal, the Sheriff, and the Chief Deputy Sheriff, and found that not one of them knew of Joe Nelson (R. 348–349). On September 18, 1939, Brendel told Meyer that investigators for the Alcohol Tax Unit had been unable to locate a Joe Nelson in

[2] The invoice showed a sale of 38 cases (R. 281); the entry recorded 35 cases.

Leonard, Texas, and that nothing was known of him in Leonard or its vicinity (R. 374). Inspector Carrier was present at the conversation and corroborated Brendel's testimony (R. 376). The sale of October 13, 1939, was, nevertheless, entered as a sale to Joe Nelson, Leonard, Texas.

When the shipment to Nelson was seized in Tork's possession, the name of Joe Nelson, Leonard, Texas, was not written or printed on any of the cartons containing the liquor, nor were there any marks of any kind on the cartons showing the consignee or destination (R. 416).[3]

Counts 1 to 3, inclusive, of Indictment 15,129 charged that on March 27, March 31, and June 30, 1939, respectively, petitioner Monarch Distributing Company and others, not including petitioner Meyer, made certain false entries on Form 52 B, i. e., that certain described liquors had been sent to Mike O'Brien, whose name or names and address they had been sent to a person or persons other than Mike O'Brien whose name or names and address or addresses were unknown to the grand jurors (R. 29–33). The sufficiency of the evidence to sustain the conviction under these counts is not challenged.

---

[3] U. S. C., Title 18, Section 390, makes it a crime to make an interstate shipment of a package containing intoxicating liquors unless the name of the consignee is plainly labeled on the outside of the package.

ARGUMENT

I

In supplements to their petition the petitioners concededly urge for the first time that Counts 1 and 6 of Indictment 15,126 and Counts 1 to 3, inclusive, of Indictment 15,129 are fatally defective because the statute penalizes rectifiers and *wholesale liquor dealers* who falsify their records of *distilled* spirits received and disposed of, whereas the counts in question fail to charge that the petitioners were either rectifiers or wholesale liquor dealers or that the spirits were distilled spirits.

Each count charged that the defendants made a false entry in a record required to be kept by them, which record constituted a portion "of the monthly report of a wholesale liquor dealer." Each also refers specifically by line, page, and date to the Treasury Department Form wherein the false entry was recorded (R. 3, 11–12, 29–33). These forms are entitled "Wholesale-Liquor-Dealers Monthly Report" (see, *e. g.*, R. 132–133). It is evident, therefore, that the indictment sufficiently alleged that the petitioners were wholesale liquor dealers.

Each count also describes the liquors received or disposed of by the defendants as "alcoholic spirits" (R. 3, 11–12, 29–33). This term is clearly broad enough to embrace "distilled spirits." Moreover, the forms to which reference is made in each count specifically disclose that they refer only to "dis-

tilled spirits" received and disposed of (see, *e. g.*, R. 132, 224, 225). Plainly the petitioners were sufficiently advised that the spirits involved were distilled spirits.

A comparable attack was rejected in *Hewitt* v. *United States,* 110 F. (2d) 1 (C. C. A. 8th), certiorari denied, 310 U. S. 641, even upon demurrer. In that case—decided by the court that rendered the decision in *Shaw* v. *United States,* 292 Fed. 339, upon which the petitioners rely—the defendants demurred to an indictment which charged that a certain bank was a member of the Federal Deposit Insurance Corporation, whereas it should have charged that it was a bank the deposits of which were insured by that corporation. The Circuit Court of Appeals held that the demurrer had been properly overruled, since as a practical matter no one could have been in doubt as to what was meant by the allegation that the bank was a member of the Federal Deposit Insurance Corporation. The court pointed out that under the rule it announced in the *Shaw* case an indictment is fatally defective only where there is the complete omission of an essential element of the offense sought to be charged.[4]

---

[4] In the *Shaw* case the indictment contained no allegation which might reasonably have been construed as charging that the bank in question was a member of the Federal Reserve System (see 292 Fed. at p. 343).

A fortiori the attack upon the counts in question, first made in this court, must fail. The petitioners do not and cannot urge that they were surprised or prejudiced by the asserted deficiences. The records in which the alleged false entries were made were introduced in evidence (R. 46–243) and, as heretofore stated, they disclosed that they were the records of wholesale liquor dealers and that the spirits involved were distilled spirits. In *Hagner* v. *United States,* 285 U. S. 427, 433, this Court stated that "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." See also *Cannon* v. *United States,* 116 U. S. 55, 77; *Stumbo* v. *United States,* 90 F. (2d) 828, 832 (C. C. A. 6th).

II

Petitioners urge that the Circuit Court of Appeals erred in upholding their convictions on Indictment 15,126 upon the basis of Counts 1 and 6, because there was a complete failure of proof as to those counts. Since either count will support the sentences imposed, it follows that if there is sufficient evidence as to either, the petitioners' convictions may not be successfully attacked. *Cf. Brooks* v. *United States,* 267 U. S. 432, 441; *Pierce* v. *United States,* 252 U. S. 239, 252; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United*

States, 153 U. S. 584, 607; *Claassen* v. *United States,* 142 U. S. 140.

(1) Count 1 charged that the petitioners made a false entry on Treasury Department Form 52A in that the entry represented that certain spirits were received by them on July 22, 1939, whereas they were in fact received on July 20.[5] There can be no doubt under the evidence that the entry was false. The liquor was recorded on Form 52A as having been received on July 22 (R. 132–133). It was *stipulated* by the parties in the District Court that the petitioners received the liquor from the Skye Company on July 20, 1939 (R. 342), and this stipulation was fully substantiated by the testimony of Inspector Brendel, who observed the liquor being delivered at the petitioners' premises (R. 349). Indeed, petitioners stand convicted of a false entry by their own evidence. Petitioner Meyer testified that the liquor was received on July 21, but was entered on Form 52A, on July 24, as having been received on July 22 (R. 389).

Petitioners' contention seems principally to be that under the statute and Treasury Department regulations a wholesale liquor dealer is not required

---

[5] The count also charged that the entry was further false in that it was not made on July 22, the date it purports to have been made, but on July 24. It is unnecessary, however, to consider this charge, since the conviction on Count 1 is amply sustained on the basis of the charge with reference to the falsification of the record as to the date on which the liquor was received.

to enter the receipt of spirits on the day on which the liquor was received, and that, in any event, the petitioners' failure so to record the receipt of the liquor in question did not constitute a violation of the statute unless the omission was actuated by a bad motive, i. e., with an intent to deceive and defraud the Government. This argument would require discussion if Count 1 had charged a violation of that portion of the section which penalizes a wholesale liquor dealer who neglects to keep a daily record of liquor received (*supra*, pp. 2–3),[6] or, possibly, if it were necessary to support the conviction on that count on the basis of the charge therein that the entry was false because not made on the date it purportedly was made. (See footnote 5, *supra*, p. 12). The argument clearly is not relevant to the charge in Count 1 that the petitioners represented by their entry that the liquor was received on July 22 whereas, actually, it was received on July 20, or, accepting their own testimony, on July 21.

With respect to petitioners' contention that conviction requires proof that the entry was made "wilfully," i. e., with "bad motive," a sufficient answer is that the statute penalizes, without qualification, one who "makes a false entry." Nowhere does the statute make wilfulness an element of the

[6] It is therefore unnecessary to consider the construction which should be given the provision of the statute requiring a wholesale liquor dealer to keep "daily" at his place of business a record of distilled spirits received and disposed of (*supra*, p. 2).

crime of false entry, or indeed of any of the acts or omissions penalized thereby. It is, of course, open to Congress in the prohibition of certain acts—particularly in an area subject to notorious abuses—to provide "that he who shall do them shall do them at his peril." *United States* v. *Balint,* 258 U. S. 250, 252; see also *Reg.* v. *Tolson,* 23 Q. B. D. 168, 60 L. T. R. 899, 902 (1889). It is unnecessary to go so far in the present case. Petitioner Meyer's own testimony shows that the entry was knowingly false (R. 389). Certainly, in the absence of any qualifying language in the statute, no more is required.[7]

(2) Count 6 of Indictment 15,126 charged that the petitioners made a false entry upon Treasury Department Form 52 B in that this entry represented that certain spirits had been sent to Joe Nelson of Leonard, Texas, whereas the shipment was in fact made to one Joe Nelson at Kansas City, Missouri (R. 11–12). Petitioners assert in effect that there was no evidence to overcome the testimony of petitioner Meyer that the liquor was in fact shipped to Joe Nelson at Leonard, Texas, with a stop-over at Kansas City, Missouri, other than allegedly incompetent testimony respecting a statement made by one Chester Tork to Government agents, after his arrest and outside of the presence

[7] The petitioners also assert that the Government was not defrauded of its revenue by virtue of the false entry as to the date the liquor was received. There is nothing in the statute which makes a defrauding of the Government an element of the crime.

of the defendants, that he was taking the liquor, delivered to him at Kansas City, to Topeka, Kansas.

The District Court, however, in finding petitioners guilty upon Indictment 15,126, stated that "I have eliminated from consideration all hearsay and other improper testimony and have reached my conclusions solely upon the competent evidence in the case" (R. 423–424). And the Circuit Court of Appeals, in sustaining petitioners' conviction under Count 6 of Indictment 15126, made no reference to Tork's statement, and rested its affirmance on competent evidence which amply sustains the convictions.

Indisputable evidence shows that the liquor was not sent to Joe Nelson at Leonard, Texas, via Kansas City. The liquor was transported from petitioners' premises in East St. Louis, Illinois, by Riss & Co., a motor-vehicle common carrier, and that company's bill of lading (R. 318–319) and delivery receipt (R. 325) show that the liquor was sent C. O. D. to "Joe Nelson, Kansas City, Missouri." If the shipment had in fact been destined for Leonard, Texas, with a stop-over at Kansas City, these instruments would, of course, have reflected that fact. The record also discloses that upon its arrival at Kansas City the liquor was received by Tork, who paid $649.32 therefor and acknowledged receipt of the liquor by signing the name Joe Nelson (R. 345, 347).

Petitioners further contend that there was n
evidence to show that they had knowledge that th
liquor was not in reality bound for Leonard, Texas
and, therefore, no evidence that they knew th
entry in Form 52B to be false. In addition to th
evidence heretofore recited, establishing that th
liquor was in fact really destined for Kansas City
there was evidence that prior to the shipment o
the liquor petitioner Meyer had been informed b
Revenue Inspectors that they had made an exten
sive investigation in Leonard, Texas, which dis
closed that no such person as Joe Nelson reside
there. Notwithstanding this information, the pe
titioners entered the shipment on Form 52B a
having been made to Joe Nelson, Leonard, Texas.
There is also evidence (R. 416) that petitione
shipped the liquor without labeling the outside o
the packages with either the name of Joe Nelso
or the name of any consignee, although that con
stituted a violation of law (see footnote 3, *supra*
8).[9] In the light of this evidence it cannot b
doubted that petitioners in making the entry knew
it to be false.

---

[8] As the District Court intimated, this information shoul
at least have put Meyer "on notice of inquiry" (R. 375). I
also shatters petitioners' argument rested on the displa
to Meyer of a federal retailer's license issued to Joe Nelso
of Leonard, Texas (Pet. 10). In view of this notice tha
Nelson was an impostor, there is no basis for any contentio
that punishment should not be meted out where "the whole
saler accepts the impostor in good faith" (Pet. 13).

[9] Petitioners attack as unsupported by the evidence (Pe
12) the statement in the opinion of the court belo

CONCLUSION

Petitioners' convictions were properly upheld, there is plainly no important question of federal law presented, and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

WENDELL BERGE,
Acting Assistant Attorney General.

RAOUL BERGER,
Special Assistant to the Attorney General.

GEORGE F. KNEIP,
W. MARVIN SMITH,
Attorneys.

FEBRUARY 1941.

---

that the packages were not labeled as required by law (R. 498). The record speaks for itself (R. 416).

Petitioners intimate that the court below, in referring to the nonlabeling of the packages, apparently believed that petitioners were charged in Count 6 with failing to label the packages as required by law, instead of with making a false entry. There is no basis in the language of the opinion for any such assumption. And the petitioners' omission to label, contrary to law, obviously had a bearing on their knowledge of the falsity of their entry.

U. S. GOVERNMENT PRINTING OFFICE: 1941